STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC UTILITIES COMMISSION
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September 11, 1997

VIA FEDERAL EXPRESS

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W. , Room 222
Washington, D.C. 20036

Re: CC Docket No. 94-129

Dear Mr. Caton:

Enclosed you will find an original and four copies and a diskette containing, in one file, the **COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA ON UNAUTHORIZED CHANGES OF CONSUMERS' LONG DISTANCE CARRIERS.**

Also enclosed is one additional copy to be conformed and returned to me in the enclosed self-addressed envelope.

Thank you for your attention to this matter. If you have any questions, please call me at (415) 703-1319.

Sincerely,

Helen M. Mickiewicz

Helen M. Mickiewicz
Attorney for the People of the
State of California and the Public
Utilities Commission of the State
of California

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996	)	DOCKET FILE COPY ORIGINAL
	)	
	)	CC Docket No. 94-129
Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers	)	

COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA ON THE FURTHER NOTICE OF PROPOSED RULEMAKING ON UNAUTHORIZED CHANGES OF CONSUMERS' LONG DISTANCE CARRIERS

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Dated: September 11, 1997

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I. INTRODUCTION AND SUMMARY

The People of the State of California and the Public Utilities Commission of the State of California (California or CPUC) submit these comments to the Federal Communications Commission (FCC or Commission) on the Further Notice of Proposed Rulemaking (FNPRM) regarding the Commission's proposed modifications to its rules regarding unauthorized transfers of customers from one telecommunications carrier to another, more commonly known as "slamming".[1] In this FNPRM, the FCC proposes specific requirements to implement Section 258 of the Telecommunications Act of 1996 ("the Act"), and asks, among other things, whether its verification rules in Sections 64.1100 and 64.1150 (47 CFR, Part 64, Subpart K) should apply to all telecommunications carriers, whether its rules should apply when carriers solicit subscribers regarding preferred carrier (PC) freezes, whether "welcome packages" should be used as a method of verification, and what the relationship should be between the two carriers and the customer.[2]

California's comments will necessarily be constrained by the fact that the CPUC has instituted an investigation/ rulemaking on slamming in which most of the issues in the FNPRM will probably be addressed and, therefore, the CPUC

[1] "Slamming" occurs when a telecommunications carrier fraudulently transfers a subscriber's service without the subscriber's consent.

[2] The "welcome package" verification option of the FCC's Rules 64.1100(d)(7)&(8) provide that if a customer does not return a postcard to the IXC within 14 days after the date the information package was mailed to the customer, the customer will be switched.

cannot prejudge the outcome of proceedings still pending before it. However, two guiding principles undergird these comments: 1) customers should have the absolute right to choose with whom they will do business; and 2) residential preferred carrier changes should be third-party verified, as is required by California law, except where the customer calls the local exchange carrier (LEC) directly and requests the change.

California applauds the FCC for its efforts to strengthen its anti-slamming rules. However, California has in place a comprehensive and effective anti-slamming program. In addition to commenting on many of the FCC's specific proposed rule changes or new rules, the CPUC's comments will underscore the need for the FCC to continue to work in tandem with the states to ensure that proven state programs can continue in place.[3]

II. STATE PROGRAMS SHOULD CONTINUE IN FORCE

In the FNPRM, the FCC suggests, without stating explicitly, that it proposes to apply its expanded anti-slamming rules to the provision of both local exchange and intraLATA toll services.[4] It is unclear to California whether the FCC is

[3] For example, in DA 96-1077, a true copy of which is attached hereto as Appendix A, the Common Carrier Bureau, issued a staff ruling clarifying that the CPUC's PIC freeze imposed on a carrier engaged in slamming was not preempted by the 1996 Act. California applauds and greatly appreciates the Commission's ensuring the ability of States to enforce their anti-slamming laws and protect consumers.

[4] In ¶ 7 of the FNPRM, for example, the Commission makes the following observations: "Competition will also fundamentally change the role of the LECs, which traditionally have been viewed as neutral third parties charged with implementing a subscriber's preferred long distance carrier choice in accordance with our equal access rules. Not only will LECs become competitors in the long distance business, IXCs and other carriers will compete with LECs to provide of (sic) local exchange service. Under the 1996 Act, the slamming rules apply to all telecommunications carriers; thus, we must assess whether existing safeguards against slamming are adequate in a marketplace in which carriers can compete for local as well as long distance service customers, and where there may

proposing to adopt, apply, and enforce its rules directly to local exchange and intrastate/ intraexchange toll service providers.

The CPUC notes that in its 1995 Report and Order,[5] the FCC declined to pre-empt any then-existing state anti-slamming programs.[6] California believes that the FCC should continue that policy, particularly in light of the language in § 258(a) which reserves states' authority to enforce anti-slamming "procedures with respect to intrastate services." (47 U.S.C. 258(a).) In addition, the recent Eighth Circuit decision regarding the Commission's interconnection order limited the FCC's ability to adopt rules pertaining to intrastate services. California believes the FCC and the states should continue to work together to tackle the ever-increasing scope and scale of slamming.

The CPUC has had in place a comprehensive and effective anti-slamming program for several years. The heart of California's program is Public Utilities (P.U.) Code § 2889.5, a copy of which is attached as Appendix B.[7] Since the implementation of protective mechanisms, California's slamming problem has been reduced significantly. At the peak of the problem in April 1996, Pacific Bell, California's largest incumbent local exchange company (ILEC), reported that

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no longer be an independent third party executing changes in subscribers' telecommunications services." (FNPRM, ¶ 7.)

[5] FCC 95-225, CC Docket No. 94-129, Released June 14, 1995, ¶ 43.

[6] The Commission noted that some commenters urged it to "preempt inconsistent state law", but that none of those commenters "cites specific state regulations that warrant federal preemption". (FCC 95-225, ¶ 43.) The FCC decided to consider specific preemption questions on a case-by-case basis. (Id.)

[7] P.U. Code § 2889.5 was most recently amended last year, and the amended version became effective January 1, 1997.

about 24,000 lines were being slammed every month. Recently, the figure has declined to approximately 12,000. In response to continued transgressions, the CPUC has instituted formal investigations of more than a dozen carriers, suspending or revoking the operating authority of three, and imposing lesser penalties on others. California has also already required independent third party verification (TPV) on all residential Preferred Interexchange Carrier (PIC) changes, and expects further success in the reduction of slamming incidents. The Commission should clarify that states have the authority to take all necessary enforcement actions including in the most egregious cases suspending or revoking the state certificates authorizing provision of intrastate telecommunications service, in order to protect the public safety and welfare and to safeguard consumer interests. States should retain flexibility to adopt the rules to fit their own specific needs, in particular where a state, like California, has encountered high incidence of slamming by multiple carriers.

A. California's Experience With Unauthorized Customer Transfers

The occurrence of widespread unverified transfers is a relatively recent phenomenon in California. Until June 1997, when the CPUC adopted a registration process for non-dominant interexchange carriers (NDIECs), the rules and regulations governing entry and regulation of NDIECs had not changed substantially. While the long term effects of the move to register NDIECs are not

yet evident, it appears that in the short term the level of unauthorized subscriber changes has not varied substantially. Still, the CPUC has perceived that slamming is an increasing problem for consumers.[8]

In a pending combined rulemaking and investigation, the CPUC has requested input to further develop rules and enforcement techniques that will address the problem without having unnecessary or unwanted consequences on the development of competition in California.[9] Our current solicitation for input necessarily limits California's comments here to a discussion of our experience to date in our anti-slamming program.

B. California's Existing Law

To encourage full and fair competition as well as to ensure customer protection, the California State Legislature and the CPUC have adopted laws and regulations which set out specific requirements for obtaining customer authorization to transfer presubscribed service between interexchange carriers (see, e.g. P.U. Code § 2889.5, attached as Appendix B). To enforce the applicable statutes and regulations, the Commission and its staff have undertaken numerous informal and formal investigations of telecommunications carriers alleged to have transferred customers without authorization. (See Appendix C for a summary of cases.)

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[8] See Appendix C, OII/ OIR 97-08-001, August 1, 1997. p 4
[9] Appendix C, p. 4.

In prosecuting cases of unauthorized customer transfer, the CPUC has found that the limited evidence available to support allegations of slamming complicates these prosecutions. Only requests to the LEC in which the customer specifically alleges unauthorized customer transfer are compiled and reported as PIC disputes.[10]

California Senate Bill (SB) 1140 (August 17, 1996) added the additional requirement that before a company makes any change to a residential service, the transfer must be verified by a third party. The bill, effective January 1, 1997, revised P.U. Code § 2889.5.

III. SPECIFIC RECOMMENDATIONS ON ANTI-SLAMMING RULES

A. California supports verification requirements for the local exchange market.

The CPUC encourages the FCC to extend many of its verification rules and requirements to cases where a customer's local service provider (LSP) is changed. (FNPRM, ¶ 11.) Currently, California law governing a customer's transfer between interexchange carriers also applies to all telecommunications service providers for services in which competition has been authorized. As mentioned above, many of California's rules closely mirror the FCC's current rules for subscriber changes.

[10] In California's experience, it appears that many NDIECs do not keep records of slamming allegations.

With the expansion of competition into the local exchange market, the CPUC is concerned that opportunities for slamming will increase. The CPUC believes local exchange consumers should have the protections afforded consumers for other telecommunication services.

B. California Supports the Use of Third Party Verification for All Changes of Service for Residential Consumers

Like the FCC, this Commission is aware that there is a significant cost burden associated with Third Party Verification (TPV). Therefore, the CPUC does not lightly advocate its use. California state law requires TPV for any transaction that changes a telecommunications provider for a residential customer. The California Legislature passed the amended P.U. Code § 2889.5 subsequent to the opening of the local exchange market to competition, and the statute plainly applies to providers of service in that market.

The CPUC to date has found TPV to be a necessary and effective preventive tool against unauthorized transfers. In spite of the costs incurred by providers, the CPUC is convinced that TPV is warranted in certain circumstances, and is in the best interests of both consumers and preferred service providers. Furthermore, the California Legislature recently passed a law (SB 447) creating PU Code § 366.5 which requires TPV for all residential electric consumers switching electric service providers.

C. "Welcome Packages" Are Allowed Under California Law, But Have Been Used Fraudulently

Current California statute allows the use of information packages seeking confirmation of a customer's change in service (labeled in the FNPRM as "welcome packages").[11] (FNPRM, ¶¶ 16-18, 63-64.) The "welcome package" method has been abused in California because, unlike other verification methods, this method requires no affirmative action by customers. In cases litigated before the CPUC, a common scenario has emerged, in which a telephone company conducts an initial sales pitch, and then "verifies" the sale, even if the customer did not accept a change, by mailing a notice ("welcome package"). Sometimes a company will mail a welcome package even if there has been no contact at all with the customer. The slam is completed if the customer does not realize that the transfer notice must be refused. In addition, notification mailings are often not received, sent to the wrong person, or received but discarded as junk mail.

California supports the FCC's investigation of the appropriateness of "welcome packages" as a transfer verification. In fact, the CPUC is currently soliciting comments on the appropriate use of written verification in its pending rulemaking.

[11] California P.U. Code § 2889.5 B (ii), Appendix B.

D. Preferred Carrier (PC) or Preferred Interstate Carrier (PIC) Freezes, Third Party Verification (TPV) of PC Freeze Requests

As a general rule, the CPUC proposes that companies executing freezes should be required to use TPV if they have an economic interest in the outcome, that is, if the customer would be "frozen" to them. Conversely, a company should not be required to provide TPV if it has no interest in the outcome of the freeze. When a LEC institutes a freeze coincident with a customer's choosing the LEC to provide interexchange service,[12] the CPUC suggests the use of TPV in order to insure that the freeze was requested by the customer. Likewise, when a LEC institutes a freeze coincident with a customer's choosing a new interexchange carrier (IEC) that is not affiliated with the LEC, the LEC should not have to obtain TPV prior to instituting the freeze. Similarly, a LEC should not be required to institute TPV in cases where a customer is not changing his/ her IEC but requests a freeze to an interexchange carrier not affiliated with the LEC. The CPUC agrees that PC freezes should be subject to request only by the consumer, and directly to the LEC. A provider including the LEC should not be able to institute a freeze on behalf of a customer without a customer's explicit request.

The CPUC does not support allowing LECs to solicit their current customers for a freeze of PIC. Recently, the CPUC issued a decision on the implementation of intraLATA toll presubscription that forbade local exchange

[12] A "freeze" is defined as when a subscriber's service is locked to a particular carrier, and any solicitation to the

carriers from soliciting customers for PIC freezes during the introduction of intraLATA toll presubscription. As many incumbent LECs enter the in-region interLATA market, there will be a strong incentive to freeze the PICs of the customers the incumbent LECs have "won". Similarly, in California, PICs have not been introduced for intraLATA toll service and the incumbent LECs have an economic incentive to retain customers. Rather, if the FCC's goal is to fully inform customers about ways to prevent any unauthorized changes of carriers, the FCC should require the LECs to publish, on a regular basis, an informational insert that provides consumers with options to prevent unauthorized changes of their preferred telecommunications carrier.

E. Relationships Between And Responsibilities of the Unauthorized Company, the Properly Authorized Company, and the Subscriber.

Economic incentives to slam or to allege a slam should be removed. If customers pay the slammer, there is an incentive to slam. However, if customers pay nothing, there is an incentive to allege a slam when none occurred. The solution is to require customers to pay their preferred carrier for calls made after the unauthorized change, that is, after the calls were re-rated. This makes the preferred carrier whole, provides little incentive for a consumer to falsely allege that the transfer was unauthorized, and provides little or no incentive to slam.

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current carrier to switch the customer is summarily refused.

In addition, the FCC could allow the customer to pay the money directly to his/ her desired carrier rather than to the slammer, who then functions as an intermediary creating more opportunity for abuse. Having the customer pay the preferred carrier is preferable for several reasons: 1) the slammer cannot refuse to pay, delay, or abscond with the money that is due the authorized carrier; 2) outraged consumers often refuse to pay the unauthorized carrier; and 3) neither wronged party, the consumer or the slammed carrier, need incur the expense and trouble of applying for moneys to be returned from an unscrupulous provider.

Finally, the CPUC supports, whenever possible, the recovery of all damages to wronged consumers. However, the CPUC also realizes that certain products or incentives, (for example, accrued airline mileage) may be difficult to reimburse. Given that the FCC's proposals would extend restitution beyond incurred telecommunication charges, the CPUC urges the FCC to consider very cautiously taking this step because it may be burdensome and impractical to enforce.

F. Changes in Resale Carrier's Underlying Network

The FCC seeks comment on whether, if the underlying network provider changes, the resale carrier has a responsibility to report the change to the customer. (FNPRM, ¶¶ 36-40.) The CPUC supports the Telecommunications Resellers Association (TRA) proposal as outlined in the FNPRM, except that, in addition, the customer should be notified if the change in underlying carriers will result in any change in the service provided to the customers, i.e. the new underlying carrier

has less network coverage than the prior carrier.[13] Further, customers should be notified of a change in the underlying carrier if identification of the underlying carrier was part of the service reseller's agreement with the customer, or part of the reseller's description of services to the customer.

IV. SUGGESTIONS FOR IMPROVED FEDERAL-STATE COORDINATION IN THE ENFORCEMENT OF ANTI-SLAMMING REGULATIONS

Beyond the specific recommendations for improved federal anti-slamming regulations, the CPUC believes both the FCC and the CPUC could more effectively enforce anti-slamming regulations if state regulatory agencies and the FCC communicated on a regular basis about the enforcement activities of each agency. The FCC could serve the vital role of being a clearinghouse on enforcement activities currently occurring at the state level and at the FCC. The FCC may want to consider having regular conference calls where states could share their experiences and develop a contact list of those responsible for enforcement activities at each state regulatory agency and the FCC. Finally, it appears that some companies will conduct illegal transfers in one state and then move to another state when enforcement activities commence. If this pattern is common, the FCC could greatly aide state enforcement activities by keeping a list of states that have initiated enforcement activities against a carrier.

[13] See FNPRM, ¶¶P36-40 describing TRA's proposal as contained in its Petition for Clarification filed in December 1995. TRA's proposal suggests that the FCC establish a "bright-line" test in which notification would be required for the following two circumstances a) if the provider committed – in writing, to the customer – to not switching underlying providers b) if the underlying network provider was identified in a bill, correspondence.

V. CONCLUSION

The gravity, severity, and frequency of slamming incidents convince California that more must be done to combat the problem on an interstate and intrastate basis. We therefore concur with the FCC's tentative conclusion that current federal slamming protections should be strengthened. Neither the FCC nor the states, acting alone, can truly prevent customers from being slammed. It will take a coordinated federal-state approach and vigorous enforcement at both levels to stem the tide of illegal preferred carrier changes. The FCC must play a vital role in promoting communication between regulating agencies and the FCC, and among state regulatory agencies. Enhanced communication will facilitate the enforcement of anti-slamming regulations.

Respectfully submitted,

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Dated: September 11, 1997

APPENDIX A

Federal Communications Commission
Washington, D.C. 20554

July 3, 1996

DA 96-1077

Mark Fogelman, Esq.
Principal Counsel
State of California
Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102-3298

RE: Request for Staff Interpretative Ruling Regarding Preemptive Effect of Commission's Regulations Governing Changes of Consumers' Primary Interexchange Carriers and the Communications Act of 1934, As Amended, on Particular Enforcement Action Initiated by the California Public Utilities Commission

Dear Mr. Fogelman:

This responds to your May 28, 1996 letter to Regina M. Keeney, Chief, Common Carrier Bureau, seeking a staff interpretative ruling concerning the Federal Communications Commission's ("FCC" or "Commission") regulations governing changes of consumers' primary interexchange carriers ("PIC")[1] and the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("the Act").[2] Specifically, you request a staff ruling that neither the Commission's rules nor the Act preempt the California Public Utilities Commission's ("CPUC") particular enforcement action in its order instituting an investigation ("OII")[3] into the activities of Heartline Communications, Inc. ("Heartline") and affiliated entities, including Total National Telecommunications, Inc. ("TNT").[4] As described below, the OII imposed on the subject carriers an interim PIC freeze to protect the public from unauthorized PIC changes pending a further order by the CPUC.

As discussed more fully below, it appears that neither the Commission's PIC-change rules nor the portion of the Act regarding carriers' PIC changes preempts the specific enforcement action taken by the CPUC. We emphasize, however, that this informal staff ruling is limited to the specific facts and circumstances set forth in your May 28 letter. Different or additional facts and circumstances could warrant a contrary conclusion.

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1 *See* Sections 64.1100-1150. 47 C.F.R. § 64.1100-1150.

2 47 U.S.C. § 151 *et seq.*

3 Order Instituting Investigation into the Operations of Heartline Communications, Inc., I.96-04-024, California Public Utilities Commission, issued April 10, 1996. Your May 28 letter includes a copy of the OII.

4 The OII states that TNT is doing business as Total World Telecommunications ("TWT").

Moreover, nothing in our analysis should be construed to prejudge any issues and arguments that might be raised in any Commission proceeding that addresses preemption issues in connection with the new sections of the Act.

State law may be preempted by Congress through the proper exercise of its legislative powers, or by a federal agency acting within the scope of its congressionally delegated authority.[5] We understand your letter to seek a staff ruling regarding both kinds of preemption. We first address the FCC's regulations governing changes of consumers' PICs and whether the CPUC's interim PIC freeze conflicts with these regulations or frustrates the purposes thereof.[6]

A. The Commission's PIC-Change Rules and Orders

The Commission first prescribed rules and procedures[7] for implementing equal access[8] and customer presubscription[9] to an interexchange carrier ("IXC") in 1985.[10] The Commission's original allocation plan required IXCs to have on file a letter of agency ("LOA") signed by the customer before submitting PIC change orders to the local exchange carrier ("LEC") on behalf of the customer.[11] After considering claims by certain IXCs that this requirement would stifle competition because consumers would not be inclined to execute the LOAs even though they had agreed to change their PIC, the Commission later modified

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[5] *City of New York v. F.C.C.*, 486 U.S. 57, 63-64 (1988); *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355, 368-69 (1986).

[6] *See id.*

[7] Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 911 (1985) (*Allocation Order*), *recon. denied*, 102 FCC 2d 503 (1985) (*Reconsideration Order*); Investigation of Access and Divestiture Related Tariffs, Phase I, 101 FCC 2d 935 (1985) (*Waiver Order*).

[8] Equal access for interexchange carriers ("IXCs") is that which is equal in type, quality, and price to the access to local exchange facilities provided to AT&T and its affiliates. *United States v. American Tel. & Tel.*, 552 F. Supp. 131, 227 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) ("*MFJ*"). Equal access allows end users to access facilities of a designated IXC by dialing "1" only. *Allocation Order*, 101 FCC 2d at 911.

[9] Presubscription is the process by which each customer selects one primary IXC from among several available carriers for the customer's phone line(s). *Allocation Order*, 101 FCC 2d at 911, 928. Thus, when a caller dials "0" or "1," the caller assesses only the primary IXC's services. A caller can also access other IXCs by dialing a five-digit access code (10XXX). *Id.* at 911.

[10] Pursuant to the *MFJ*, the Bell Operating Companies were ordered to provide equal access to their customers by September 1986, where technically feasible. *Id.*

[11] An LOA is a document, signed by the customer, which states that the customer has selected a particular carrier as that customer's primary long distance carrier. *Allocation Order*, 101 FCC 2d at 929.

its requirements to allow IXCs to initiate PIC changes if they had "instituted steps to obtain signed LOAs."[12]

In 1992, the Commission again revised its rules because it continued to receive complaints about unauthorized PIC changes, a practice commonly known as "slamming."[13] Specifically, while the Commission recognized the benefits of permitting a telephone-based industry to rely on telemarketing to solicit new business, it required IXCs to institute one of the following four verification procedures before submitting PIC change orders generated by telemarketing: (1) obtain the consumer's written authorization; (2) obtain the consumer's electronic authorization by use of a toll-free number; (3) have the consumer's oral authorization verified by an independent third party; or (4) send an information package, including a prepaid, returnable postcard, within three days of the consumer's request for a PIC change, and wait 14 days before submitting the consumer's order to the LEC, so that the consumer has sufficient time to return the postcard denying, cancelling, or confirming the change order.[14] Thus, the Commission's rules and orders require that IXCs either obtain a signed LOA or, in the case of telemarketing solicitations, complete one of the four telemarketing verification procedures before submitting PIC change requests to LECs on behalf of consumers.

Because of its continued concern over unauthorized PIC changes, in June 1995 the Commission prescribed the general form and content of the LOA used to authorize a change in a customer's primary long distance carrier.[15] The Commission's revised rules prohibit the potentially deceptive or confusing practice of combining the LOA with promotional materials in the same document.[16] The rules also prescribe the minimum information required to be included in the LOA and require that the LOA be written in clear and unambiguous language.[17] Additionally, the rules prohibit all "negative option" LOAs[18] and require that

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[12] *Waiver Order*, 101 FCC 2d at 942.

[13] "Slamming" means the unauthorized conversion of a customer's IXC by another IXC, an interexchange resale carrier, or a subcontractor telemarketer. Cherry Communications, Inc., Consent Decree, 9 FCC Rcd 2986, 2087 (1994).

[14] *See* 47 C.F.R. § 64.1100; Policies and Rules Concerning Changing Long Distance Carriers, 7 FCC Rcd 1038 (1992) (*PIC Change Order*), *recon. denied*, 8 FCC Rcd 3215 (1993).

[15] Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, 10 FCC Rcd 9560 (1995), *recon. pending* (*LOA Order*).

[16] *See LOA Order*, 10 FCC Rcd at 9574. Checks that serve as an LOA are excepted from the "separate or severable" requirement so long as the check contains certain information clearly indicating that endorsement of the check authorizes a PIC change and otherwise complies with the Commission's LOA requirements. *Id.* at 9573.

[17] *Id.* at 9564-65.

LOAs and accompanying promotional materials contain complete translations if they employ more than one language.[19]

The Commission has thus taken substantial steps to protect consumers and legitimate competition from unauthorized PIC changes by carriers. It has not, however, acted to displace complementary state efforts. Indeed, in the *LOA Order*, the Commission found that state action regarding slamming appeared to be consistent with our own, and specifically declined to preempt any state law regarding the unauthorized conversion of a consumer's long distance service.[20] The Commission emphasized that it would consider specific preemption questions on a case-by-case basis.[21]

B. The CPUC's Order Instituting Investigation

In the instant case, the OII reflects that the CPUC's Safety and Enforcement Division's Special Investigations Unit ("Staff") conducted a preliminary investigation of consumer complaints and other information which demonstrated that Heartline has repeatedly engaged in the unauthorized switching of consumers' primary interexchange carriers.[22] It appears that the Staff began its investigation of Heartline, a Texas corporation, in conjunction with Heartline's application seeking authority to provide resale interexchange telecommunications services within California.[23] Heartline subsequently withdrew its application, and to date, has not received a certificate of public convenience and necessity ("CPCN") to provide intrastate telecommunications service within California.[24] Nevertheless, the Staff concluded that Heartline appeared to be providing intrastate service without certification "through a device or scheme that the Staff has yet to decipher fully."[25] As set forth in the OII, the Staff believes that Heartline was relying on contractual relationships with other certified carriers to provide intrastate service to consumers that had been switched to Heartline -- in many cases, without valid authorization from the consumer.[26]

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[18] *Id.* at 9561. "Negative option" LOAs require consumers to take some action to avoid having their long distance telephone service changed.

[19] *Id.* at 9581.

[20] *Id.* at 9582-83.

[21] *Id.*

[22] OII at 5.

[23] *Id.* at 3.

[24] *Id.* at 3-4.

[25] *Id.* at 3.

[26] *Id.* at 13.

The OII further reflects that the Staff began its investigation of TNT when consumer complaints indicated some kind of relationship between Heartline and TNT.[27] The investigation revealed that during a four-month reporting period beginning in mid-November 1995, Pacific Bell received over 10,000 complaints alleging that TNT had switched consumers' PICs without the consumers' authorization.[28]

The CPUC concluded in the OII that if the allegations and facts adduced in the course of the Staff's preliminary investigation are true, then Heartline and TNT, operating as a combined entity, are slamming California consumers in violation of Section 2889.5 of the California Public Utilities ("P.U.") Code, California's anti-slamming legislation.[29] Specifically, the Staff's investigation indicates that the LOA/contest forms[30] allegedly used by Heartline and TNT in marketing telephone services to customers do not provide subscribers with enough information to make an informed decision to change long-distance service providers.[31] The Staff's investigation also indicates that Heartline and TNT have not attempted to verify PIC-change order requests submitted on behalf of California subscribers.[32] The OII further concludes that because Heartline has provided intrastate service without authorization in violation of Section 1001 of the California P.U. Code, such unauthorized provision of intrastate service exacerbates the apparent unlawful slamming by Heartline.[33]

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[27] *Id.* at 6. The OII reports that in September 1995, it granted TNT, another Texas corporation, a CPCN to provide inter- and intraLATA service within California. The OII states that it has strong reason to believe that Heartline and TNT are presently a single entity under common control, although it is unclear when this apparent merger or acquisition occurred because Heartline has failed to respond to the CPUC's requests for information. *Id.* at 2, 4.

[28] *Id.* at 5. The OII also states that Pacific's reports show that over half of these PIC-change complaints were brought by consumers with a Spanish language preference. *Id.* at 6. In addition, the OII states that GTE California reported a large number of PIC-change disputes for TNT as compared to other carriers. *Id.*

[29] *See id.* at 9, 11-12.

[30] The OII reports that a consumer who requests a copy of his or her LOA is provided with a copy of a raffle or sweepstake entry form that the consumer may have filled out to win a free trip or a prize. According to the OII, consumer complaints consistently state that the consumers were not aware that by filling out the contest entry form they were authorizing a change to their primary long-distance service provider. *Id.* at 7-8.

[31] In particular, the OII states that Heartline and TNT's LOA/contest forms contain neither language authorizing a PIC switch nor a signature line; that many consumers' signatures were forged; and that Heartline and TNT processed PIC changes when individuals other than the subscriber filled out the contest entry forms. In addition, the OII concludes that a customer could apparently be switched to a carrier of the agent's choice without the subscriber ever knowing anything about the new carrier's rates or charges. *Id.* at 12.

[32] *Id.*

[33] *Id.* at 12-13.

To address the problems identified in the Staff's investigation, the CPUC determined *inter alia*, that in light of the "apparent extremely high level of slamming and resulting harm to thousands of customers," it was necessary to impose an interim PIC freeze on Heartline and affiliated entities, including TNT, pending further order of the CPUC.[34] The interim PIC freeze prohibits Heartline and TNT from requesting that California LECs switch customers who had previously chosen other IXCs as their primary interexchange carriers to Heartline, TNT, and affiliated entities.[35] Nevertheless, Heartline and TNT may continue doing business insofar as authorized by a valid certificate issued by the CPUC, and may obtain new customers through PIC changes requested of LECs directly by customers choosing Heartline and TNT.[36]

C. Discussion

In the narrow context of the CPUC's enforcement action, we do not find that the interim PIC freeze undermines the Commission's efforts to regulate carriers' PIC-change practices. The interim PIC freeze is not a rule of general applicability, but rather a narrowly tailored enforcement action directed at particular carriers to remedy specific violations of state law pending the conclusion of an investigation. As detailed above, the CPUC's preliminary investigation revealed that numerous slamming complaints had been filed against Heartline and TNT. In particular, the CPUC reported that during a four-month period, Pacific Bell received over 10,000 complaints -- over half of which were brought by consumers with a Spanish language preference -- alleging that TNT had switched consumers' PICs without the consumers' authorization.[37] Furthermore, the CPUC determined that Heartline appeared to be providing intrastate service without state certification. In imposing the interim PIC freeze, the CPUC asserted that "[g]iven the aggravated nature and level of the violations alleged ... and given that TNT has engaged in these activities since we authorized them to provide intrastate service, we believe there is a substantial likelihood that harm to the public will continue and that there is probable cause to act."[38] Thus, the CPUC's action appears to have been a limited response designed specifically to address Heartline and TNT's apparent lack of compliance with state rules and to protect the public by ensuring that only authorized changes are made

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[34] *Id.* at 14.

[35] *Id.* In addition, the OII prohibits Heartline, TNT, and other affiliated entities from selling or transferring any of their customers. Subsequent to the issuance of the OII, TNT filed suit in the U.S. District Court for the Northern District of California, alleging, *inter alia*, that the OII and PIC freeze were preempted by the new sections of the Act. *Total National Communications, Inc. v. Cal Pub. Util. Comm'n*, U.S. Dist. Ct. No. C-96-1743-CW (N.D. Calif.). Your letter states that TNT's application for a temporary restraining order was denied by the District Court, but that the case remains pending.

[36] OII at 14.

[37] OII at 5-6.

[38] *Id.* at 14.

to a subscriber's PIC. Under these particular circumstances, we do not believe that preemption is warranted.

We now turn to the CPUC's request for a ruling regarding the preemptive effect of the Act.[39] In determining whether Congress has preempted the interim PIC freeze at issue here, we look to new Section 258 of the Act, which specifically addresses changes in subscriber carrier selections. First, we note that Section 258 contains no language expressly prohibiting states from taking action to address the PIC-change practices of telecommunications carriers.[40] Further, the language of Section 258 reflects Congressional recognition that slamming is a significant consumer problem that threatens to undermine the pro-competitive goals and policies underlying the Act.[41] Moreover, Section 258's implicit requirement that LECs execute only authorized PIC changes suggests that the CPUC's interim action to protect consumers from what appears to be a pattern of unauthorized PIC changes by Heartline and TNT is consistent with, and thus not preempted by, the Act. We emphasize again, however, that our preliminary analysis is strictly limited to the particular circumstances presented by the CPUC's May 28, 1996 letter. We decline to consider at this time the impact of other new sections of the Act pending action by the full Commission to implement these provisions.

This is an informal staff ruling issued pursuant to authority delegated in Section 0.291 of the Commission's rules.[42] Applications for review must be filed within 30 days of public notice of this action.[43]

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[39] *Time Warner Cable v. Doyle*, 66 F.3d 867 (7th Cir. 1994). Preemption may arise through an express congressional statement defining the preemptive reach of a statute, implicitly, when Congress manifests its intent to occupy an entire field of regulation, or through conflict between state and federal law, when it either is impossible to comply with both, or when state law stands as an obstacle to the accomplishment of the full congressional objectives. *Id.* at 874-75.

[40] 47 U.S.C. § 258. This section provides in pertinent part:

> (a) Prohibition.–No telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe. Nothing in this section shall preclude any State commission from enforcing such procedures with respect to intrastate services.

[41] We emphasize that our discussion of Section 258 should not be construed to prejudge the issues and arguments that might be raised in Commission proceedings to implement the requirements of Section 258. In addressing these issues, we intend to give full consideration to all the information and arguments presented.

[42] 47 C.F.R. § 0.291.

[43] 47 C.F.R. § 1.115.

I hope this information is helpful, and I thank you for your interest in this matter.

Sincerely,

Mary Beth Richards
Deputy Chief, Common Carrier Bureau